assigned to different ADIs by Arbitron. Cable commenters generally support the use of an operator-designated principal headend for determining the location of a cable system. They contend that a cable system should only be required to carry the television signals in one ADI and that to require otherwise would be unnecessarily burdensome.[109] Several cable operators propose that the location of the system's principal headend or the center of the system coordinates should be considered prima facie evidence of a reasonable choice.[110] A number of commenters state that a reasonable alternative for designating the location of the system would be the community with the bulk of subscribers.[111] Some cable operators state that it is reasonable to require them to declare their choice of principal headend within a specified period (e.g., 15 days) after the rules are issued.[112] By contrast, broadcast commenters state that carriage rights should be determined for each community served by a system on an individual basis,[113] or should take into account the entire geographic area served by the operator even if this results in mandatory carriage of signals from multiple ADIs.[114] They claim that any other approach is inconsistent with Congress' intent to preserve local television service.[115]

41. We believe it is in the public interest and fully consistent with the 1992 Cable Act to require a cable operator to provide the subscribers in each community its serves with the broadcast television stations that are local to that community. Thus, in situations where a cable system serves a community or communities in more than one county and those counties are assigned to different ADIs, the cable operator must carry all of the local commercial television signals in both ADIs (subject to the statutory safeguards provided for in the Act, e.g., the limitations on one-third of usable channel capacity, the substantial duplication limitation, the closest network affiliation limitation, etc.). If the cable operator is technically capable of segregating the channels provided to each community served, it may select, for must-carry purposes, from among those qualified commercial stations that are in the ADI in which each particular community is located. Thus, where it is technically able to do so, the cable operator may offer different must-carry channel line-ups in different communities based on the locations of the particular communities in

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109 e.g., NCTA Comments at 10-11; InterMedia Comments at 10; Time Warner Comments at 13; TCI Comments at 4-5; TKR Comments at 5-6.

110 Time Warner Comments at 15; Newhouse Comments at 30.

111 NCTA Comments at 14; Comcast Corporation (Comcast) Comments at 3-4; Viacom Comments at 66-67.

112 Time Warner Comments at 15; Adelphia Comments at 8; Newhouse Comments at 30.

113 e.g., NAB Comments at 7; INTV Comments at 3.

114 e.g., Continental Comments at 6; Westinghouse Reply at 3.

115 NAB Comments at 7-9; AFLAC Broadcast Partners (AFLAC) Comments at 3; Westinghouse Reply at 3-4.

the respective ADIs. However, if the cable system is not able to alter its channel line-up on a community-by-community basis and the system straddles two ADIs, all broadcast stations in both ADIs will be considered "local" for must-carry purposes. The statutory language and the legislative history lead us to find that this interpretation is the one intended by Congress.[116] Moreover, cable interests provide no evidence in the record that demonstrates that they are unable to configure their systems to meet this requirement.[117] It appears that a cable operator's choice of a central technical facility is simply a matter of convenience and that it is technically possible to accommodate these requirements in most cases. In addition, we are concerned that permitting cable systems straddling ADIs to choose in which of the ADIs they will be "located" would potentially allow some systems to evade must-carry obligations or make it more difficult for certain stations to achieve must-carry status.[118]

42. Modification of ADI Markets. Section 614(h)(1)(C) of the 1992 Act permits the Commission to add communities to or subtract communities from a station's television market to better reflect marketplace conditions following a written request. The Commission also may determine that particular communities are part of more than one television market. The procedures recognize that ADI markets may not always accurately reflect the area in which a particular television station should be entitled to cable carriage, and will help ensure that disruption to subscribers over the broadcast signals they receive is minimized. The statute specifies that, when considering requests to modify a television station's market, the Commission shall afford particular attention to the value of localism by taking into account such factors as 1) whether the station, or similarly situated stations, have been historically carried on the cable system or systems within such community; 2) whether the station provides coverage or other local service to the community; 3) whether any other station qualified for carriage provides coverage of news or programming of local interest; and 4) the local viewing patterns in both cable and noncable homes in the community. We asked parties to consider the procedural aspects of requests for modifications to ADI markets and whether

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116 House Report at 97.

117 Indeed, in its comments, Continental indicates that it plans to consolidate many of the headends for its Western New England region and that using a principal headend approach would create a situation where many systems will end up with distant must-carry signals in place of local stations. Continental Comments at 6.

118 For example, Cablevision has announced that it is dropping the broadcast stations licensed in the Hartford-New Haven ADI, which have been carried historically, from several of its systems. See, e.g., Electronic Media, March 8, 1993, back cover. In one case, the cable system serves communities in both Fairfield and New Haven Counties. Fairfield County is located in the New York ADI, while New Haven County is assigned to the Hartford-New Haven ADI. It appears that, if this cable operator could select one principal headend and provide must-carry signals from only one ADI, those cable subscribers in the communities located in New Haven County would be deprived of their "local" television stations.

more specific or additional criteria are needed to implement this provision.

43. Most commenters support our proposal to use the special relief process to modify television markets, pursuant to Section 76.7 of our rules.[119] They also believe it is appropriate to permit broadcasters and cable operators to make such requests,[120] although a few commenters assert that such filings should only be permitted from broadcasters[121] or only from cable operators.[122] Other commenters state that, in addition to broadcast stations and cable systems, program copyright owners[123] and subscribers[124] should be able to file or participate in these proceedings. Many cable operators recommend that cable systems be required to maintain the status quo while Commission action is pending on a request, but INTV would require carriage of a signal seeking to be added even before an FCC decision.[125] Several cable operators ask that the Commission permit conditional implementation of any requested market modification while it is pending in cases where the cable operator and the affected broadcaster are in agreement. [126]

44. The Commission received many recommendations regarding the factors that we are required to consider when evaluating requests to modify a station's market for must-carry purposes. For example, a number of parties suggest that the enumerated factors be prioritized, giving greatest weight to historic carriage,[127] viewing patterns,[128] in-state stations[129] or smaller market

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119 e.g., INTV Comments at 10-11; NCTA Comments at 14; NAB Comments at 12-13; Tel-Com Comments at 13; Malrite Comments at 4; contra WTKK TV (WTKK) Comment at 2. This commenter states that a rule making would be needed in each case.

120 e.g., INTV Comments at 8; NCTA Comments at 14; NAB Comments at 12-13; Time Warner Comments at 16; Armstrong Comments at 13; Malrite Comments at 3.

121 AFLAC Comments at 4; Capital Cities/ABC (Cap Cities) Comments at 6.

122 TKR Comments at 7.

123 National Basketball Association and National Hockey League (NBA/NHL) Comments at 4-5.

124 CFA/MAP Comments at 13; Malrite at 5.

125 e.g., Adelphia Comments at 10; TCI Comments at 9; Acton Comments at 9; INTV Comments at 7.

126 e.g., Newhouse Comments at 33; Adelphia Comments at 10; contra INTV Reply at 18.

127 INTV Comments at 9; NCTA at 15.

128 Adelphia Comments at 10; Time Warner Comments at 16-17.

129 Continental Comments at 8; Time Warner at 17

stations.[130] Several parties favor adding specific criteria to the factors, such as coverage contours,[131] mileage zones,[132] the significant viewing standard,[133] a standard for programming of community interest,[134] and inclusion of sports programming in considering local service.[135] A few commenters propose other factors, including an examination of the retail trading area served by a station[136] and a determination of whether a station's nonbroadcast activities show a commitment to local service.[137]

45. We conclude that requests for modification of a station's ADI market should be made in accordance with the procedures specified in Section 76.7 of our rules, as modified herein, for special relief filings.[138] We find this process more expeditious and less burdensome on parties and the Commission than the rulemaking process, while providing sufficient opportunity for full participation by affected parties. By using the special relief process, the procedural aspects of filing for modifications to ADI markets will be consistent with Section 614(h)(1)(C)(iv), which mandates that the Commission provide for expedited consideration of such requests.

46. We will allow either broadcasters or cable operators to file market modification requests since both parties have legitimate interests in such matters. A broadcast station submitting such a request will be required to serve a copy of its request on the cable system, other non-superstation broadcasters whose signals are carried on that system and any franchising authorities that regulate the system. Cable systems that file requests to modify a station's market must serve the request on the affected broadcaster, all non-superstation broadcast stations carried on the system and the franchising authorities in the communities served by the system. During the pendency of a petition before the Commission, cable operators will be required to maintain the status quo with regard to signal carriage. Not only is this the least disruptive approach, but it also is consistent with Section 614(h)(1)(C)(iii), which prohibits cable operators from dropping any

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130 United Communications Corporation (United) Comments at 3.

131 Adelphia Comments at 10; IFE Comments at 6; Mid-State Television (Mid-State) Comments at 4-5.

132 TKR Comments at 7; WTKK Comments at 2-3; Mid-State Comments 4-5.

133 Adelphia Comments at 10; TKR Comments at 7; Comcast Comments at 4.

134 Malrite Comments at 5.

135 NBA/NHL Comments at 6.

136 Mid-State Comments at 2-5.

137 Trinity Comments at 8-9.

138 We note that we are changing the filing deadlines for all special relief petitions and must-carry complaints. See para. 118 infra.

commercial station pending disposition of requests filed pursuant to this section. We reject INTV's proposal to require a signal to be added while a petition is pending, since an adverse Commission decision would result in the unnecessary and potentially harmful disruption of a recently added signal quickly losing carriage. As requested by commenters, we will permit conditional implementation of cable operator/broadcaster agreements to modify a given television market only where other stations' carriage and channel positioning rights are not affected by the agreement.

47. This section of the statute is intended to permit the modification of a station's market to reflect its individual situation.[139] Therefore, we do not want to restrict the types of evidence that parties can submit to demonstrate the propriety of changing a station's must-carry market. We also do not believe that it is advisable to prejudge the importance of any of the factors specified in the statute since each case will be unique. As guidance to petitioners, however, we likely would find the following information to be helpful. For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (e.g., rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable and noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.

48. Section 76.51 Top 100 Market List. Section 614(f) requires the Commission to make revisions needed to update the list of top 100 television markets and their designated communities in Section 76.51 of the existing rules.[140] This list was derived largely from Arbitron's 1970 prime time household rankings. As we observed in the Notice, this list is different from the current Arbitron list of markets due to the many new stations that have commenced operation and the population shifts that have occurred since the list was incorporated in our rules. We further noted that since Congress

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139 A few parties contend that ADI modification should be on a market, rather than a station, basis. While the 1992 Act specifically refers to adding or subtracting communities from the market of "a particular television broadcast station," we will not preclude joint filings by a group of stations or a single request from a cable operator for changes for more than one station licensed to the same community, as long as the submitted information demonstrates that each station is entitled to have its market modified.

140 47 C.F.R. § 76.51.

specifically directed the Commission to use current ADI markets for determining must-carry rights, it appears that updating the Section 76.51 list would primarily affect copyright liability under the compulsory license, although it would also have some impact on the application of our territorial exclusivity, syndicated exclusivity and network nonduplication rules.[141]

49. We had hoped that in response to the Notice commenters would provide us with a mechanism for revising the top 100 market list, including criteria for determining when a city of license should become a designated community in a television market. However, the comments we received were more generalized. A number of parties suggest that the list be expanded to include all markets, not just the top 100 markets.[142] Because market rankings affect copyright liability and the application of the Commission's exclusivity rules,[143] a few cable interests recommend that we not rerank the list of television markets, but simply revise the market names to reflect new cities of license.[144] Several broadcasters state that each market name should include every ADI city of license in the market designation.[145] Another proposed alternative is to simply replace this market list with Arbitron's ADI list.[146] On the other hand, NAB states that the Commission should not just adopt Arbitron market designations, but should make adjustments to Arbitron's list based on distances between communities, coverage patterns and competitive and public interest considerations, as was done when the original list was established.[147] Many commenters assert that the list should be updated every three years, with sufficient lead time as is done for the prime time access rule (PTAR), and effective consistent with the must-carry/retransmission consent election requirement and the copyright liability accounting periods.[148]

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141 See 47 C.F.R. §§ 73.658(m) (territorial exclusivity); 76.92-97 (network nonduplication); 76.151-163 (syndicated exclusivity).

142 Fox Comments at 7; INTV Comments at 11; NAB Comments at 18; Great America Comments at 8.

143 For copyright purposes, the fees charged for distant signal carriage under the compulsory license are based on the rank of the market where the cable system is located. Under the Commission's network nonduplication rules, the zone within which a station is entitled to enforce exclusivity rights is also determined by market rank.

144 Adelphia Comments at 11-12; Time Warner Comments 18-19.

145 Great America Broadcasting Company et al. (Great America) Comments at 8; R&R Media Corporation (R&R) Comments at 2-3; Fox Comments at 7.

146 Cap Cities Comments at 9.

147 NAB Comments at 18.

148 e.g., NAB Comments at 18; Armstrong Comments at 15; INTV Comments at 11; Cap Cities Comments at 10. Alternatively, annual updates are proposed by Malrite. Malrite Comments at 8.

50. We do not believe that a major update of the Section 76.51 market list is necessary on the basis of the record before us. Wholesale changes in or reranking the markets on the list would have significant implications for copyright liability and for the Commission's broadcast and cable program exclusivity rules. We are not prepared to make such changes on the present record. Therefore, at this time, we will only update the existing list by adding those designated communities requested by parties providing specific evidence that change to a particular market is warranted. In particular, we will make the following specific modifications: (1) rename the Columbus, Ohio, market to include Chillicothe; (2) add New London to the Hartford-New Haven-New Britain-Waterbury, Connecticut, market; and (3) change the Atlanta, Georgia, market to Atlanta-Rome.[149] We will consider further revisions to this list on a case-by-case basis. Where appropriate, we will consider such cases under an expedited rulemaking procedure whereby we will issue a notice of proposed rulemaking based on the submitted petition without first seeking public comment on whether we should do so. We will expect to receive evidence that demonstrates commonality between the proposed community to be added to a market designation and the market as a whole in such petitions.[150] We will also

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[149] See Comments of Triplett & Associates (Triplett), R&R and TV 14 Reply. See also Notice of Proposed Rule Making in MM Docket No. 92-295, 7 FCC Rcd 8591 (1992) (request by TV 14 to include Rome, Georgia, in the Atlanta television market). In that regard, interested parties commenting in MM Docket No. 92-295 were The Georgia Television Company ("GTC"), licensee of WSB-TV, Atlanta, and WGNX Inc. ("WGNX"), licensee of WGNX(TV), Atlanta, who both urge that TV 14's request be deferred or dismissed pending the outcome of this proceeding; Scripps Howard Cable of Northwest Georgia, operator of the cable system serving Rome and surrounding areas, which supports TV 14's proposal; and the Georgia Public Television Commission ("GPTC"), licensee of noncommercial educational station WGTV(TV), Athens, Georgia, which supports TV 14's request, but also proposes that the present Atlanta market should be redesignated to include Athens. In light of our action today in this proceeding, GTC's and WGNX's comments are moot. Further, because the Notice of Proposed Rulemaking in MM Docket No. 92-295 sought comment on the proposal to add Rome to the Atlanta market, we will not consider GPTC's proposal regarding Athens. Of course, GPTC is free to refile its proposal, and the Commission will then evaluate the efficacy of proceeding independently thereon. In light of our action herein, we will terminate the proceeding in MM Docket No. 92-295.

[150] In order to expedite this process, the Chief, Mass Media Bureau, is authorized to act on such petitions under delegated authority. We expect that requests for specific hyphenated market changes that appear worthy of consideration will be routinely docketed and issued as rulemaking proposals. Interested parties will then have a full opportunity to participate in the proceeding and to react to the proposal. The Commission will have an opportunity to review all such decisions upon request for review by any party. Similarly, the Bureau Chief is authorized to act on requests for the inclusion or elimination of specific communities from the local markets of stations in accordance with the factors set forth in Section 614(h)(1)(C) of the Act and the related implementing rules adopted herein discussed above.

consider requests to remove named communities from specific hyphenated markets using the same procedure.

51. Conflicting Market Designations. The Notice asked commenters to consider the potential effects of any modifications to current market designations on other existing rules and the potential conflicts that could occur because these market designations cover different geographic areas. In particular, we observed that the situation may arise where a station is entitled to must-carry status on the basis of its ADI at the same time that another station can request deletion of some portion of its programming because the applicable exclusivity and nonduplication rules use the Section 76.51 market list. Moreover, the syndicated exclusivity and network nonduplication rules use mileage zones for determining areas of protection based on a market's rank pursuant to the Section 76.51 top 100 market list. For compulsory copyright liability, the Section 76.51 market list is used to distinguish between local and distant signals and, based on a market's rank, the fees that are charged for distant signal carriage under the compulsory license. Thus, a station might be entitled to must-carry status but still be considered a distant signal for copyright purposes.

52. With respect to our program exclusivity rules, several commenters contend that we should not modify those rules, since the extent of conflict is not known and problems can be handled through special relief at least for the short term.[151] A few broadcast interests suggest that the applicable zones for application of the exclusivity rules be changed to the ADI to match the must-carry rules.[152] Alternatively, INTV recommends that every station be considered significantly viewed throughout its ADI. Under this approach, all stations within an ADI would be protected from deletion under our exclusivity rules.[153] Numerous commenters propose that we follow the provisions in the Act that prohibit an NCE must-carry station from receiving protection against another NCE station carried in fulfillment of must-carry obligations.[154] Other proposals include grandfathering existing exclusivity contracts[155] and simply eliminating the syndicated exclusivity and network nonduplication rules.[156]

53. In the Notice, we observed that the United States Copyright Office

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151 Fox Comments at 8; NAB Comments at 20; Malrite Comments at 8; Motion Picture Association of America (MPAA) Reply at 18-19.

152 Cap Cities Comments at 10; Cedar Rapids Television Company (Cedar Rapids) Comments at 3-4.

153 INTV Comments at 12.

154 NCTA Comments at 17; Time Warner Comments at 20; Appalachian Broadcasting Corp. (Appalachian) Comments at 10; Adelphia Comments at 20; Pulitzer Reply at 5.

155 Great America Comments at 10-11.

156 Acton Comments at 26-27; TCI Comments at 26-27.

(Copyright Office) has traditionally followed any changes we have made to the Section 76.51 list.[157] In its comments in this proceeding, the Copyright Office states that it will determine whether to use an updated Section 76.51 list after this proceeding is completed. It further explains that it has incorporated our market modifications in the past because the affected parties were in agreement and the changes did not represent any modification of the original must-carry rules that it uses to differentiate between local and distant stations. In addition, the Copyright Office states that, at the time of its actions, it did not foresee a large number of market redesignations.[158] Some commenters suggest that we should not address copyright matters in this proceeding or, in light of the Copyright Office's comments, that we should ensure that any changes we make do not affect copyright liability.[159] Furthermore, a number of commenters suggest grandfathering existing copyright status, especially if changes would result in fewer lower fee signals.[160]

54. We believe that we have alleviated many of the concerns expressed by the commenters by making only minor, well-documented revisions to the existing top 100 market list. Since market rankings will remain the same, the zones of exclusivity protection will be unchanged for each market, except in those few cases where additional designated communities are now named. While we recognize that under the existing syndicated exclusivity and network nonduplication rules there may be instances where a station entitled to must-carry status is subject to blacking out, we do not believe it is appropriate to modify the rules in this proceeding.[161] This decision appears consistent with the statute and the legislative history. We note that unlike the comparable situations for NCE stations, the statute does not prevent one commercial must-carry signal from requesting network nonduplication protection against another such signal.[162] The provision concerning the carriage of commercial must-carry signals in their entirety specifically exempts situations where "carriage of specific programming is prohibited" under Section 76.67 or Subpart F of Part

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157 Notice at 8059-8060 n. 24.

158 Copyright Office Comments at 2-6.

159 Time Warner Comments at 19; MPAA Reply at 17-18; Viacom Reply at 22.

160 e.g., Armstrong Comments at 14; United Video Comments at 5; Comcast Comments at 11-12; INTV Reply at 15.

161 We note in particular that a more general evaluation of the network nonduplication, syndicated exclusivity and broadcast station territorial exclusivity rules is the subject of the pending Docket 87-24, Further Notice of Proposed Rule Making in Gen. Docket 87-24, 3 FCC Rcd 6171 (1988). The exclusivity rights of stations choosing retransmission consent are discussed below.

162 Section 615(f).

76 of our rules.[163] Thus, we conclude that the existing syndicated exclusivity and network nonduplication rules should remain unchanged with respect to commercial stations. With respect to copyright matters, we believe that Congress intended for our updated Section 76.51 list to be applied to assess copyright liability, since ADIs are now to be used for market designations for must-carry purposes.

3. Selection of Signals

55. In situations where the number of qualified stations exceeds the number of signals a cable system is required to carry, Section 614(b)(2) gives the cable operator discretion in selecting the local commercial television stations that shall be carried to fulfill its must-carry requirements, except that a cable operator is not permitted to carry a qualified low power station in lieu of a local commercial television station. In addition, this subsection provides that if the cable operator elects to carry an affiliate of a broadcast network, the cable operator shall carry the affiliate of such broadcast network whose city of license reference point is closest to the principal headend of the cable system.[164] Section 614(b)(5), in turn, states that a cable operator is not required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station which is carried on its cable system, or to carry the signals of more than one local commercial television station affiliated with a particular broadcast network. However, if a cable operator chooses to carry such duplicative signals, they may be counted towards fulfillment of the system's must-carry obligations.

56. The 1992 Act requires the Commission to define the term "network"[165] for purposes of applying the must-carry provisions in situations where the programming schedules of two or more stations are similar. In the Notice, we observed that Section 614(b)(2) and one part of Section 614(b)(5) address duplicating network affiliates and the second part of Section 614(b)(5) addresses any duplicating local commercial signal. We thus proposed to fashion a definition of network that incorporates the substantial duplication concept. Such a definition would be programming source-neutral and would be used for purposes of both Sections 614(b)(2) and 614(b)(5). Several cable operators favor using the same definition for the two terms and state that it would be

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[163] Section 614(b)(3)(B). Section 76.67 requires the blacking out of certain sports broadcasts and Subpart F is our rules relating to nonduplication protection and syndicated exclusivity.

[164] The 1992 Act states that the closest station is determined by comparing the location of the principal headend of the cable system to the city of license as defined in Section 76.53 of our rules, 47 C.F.R. § 76.53, as of January 1, 1991, or any successor regulation. See paras. 9-10 supra.

[165] This requirement is set forth in Section 614(b)(2)(B) and noted in Section 614(b)(5).

easy to implement.[166] In addition, Cap Cities supports a source-neutral approach for application of Section 614(b)(5) and states that since the intent is to preserve cable operators' discretion and the public's viewing choice, the source of programming is irrelevant when assessing programming duplication.[167] These commenters generally recommend that the relevant term be defined as "airing the same programming (simultaneous or not) during weekly prime time hours."[168] However, a few cable parties oppose our proposal and contend that Congress used two different terms that accordingly should be defined separately.[169]

57. Most of the comments on this issue proposed definitions of the terms "network" and "substantial duplication." For example, TKR suggests that network affiliates should be limited to ABC, CBS and NBC stations.[170] NCTA proposes that we adopt the network definition used for the financial interest and syndication rules (i.e., an entity that provides on a regular basis more than 15 hours of prime time programming per week to interconnected affiliates that reach 75 percent of all television households).[171] Time Warner and Adelphia state that a network should be an entity that offers programming on a regular basis for 15 or more hours per week to at least 25 affiliates in 10 or more states.[172] CFA/MAP proposes a definition of network of 50 percent simultaneous weekly prime time programming.[173]

58. With respect to the definition of "substantially duplicated"

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166 Armstrong Comments at 17-18; InterMedia Comments at 17-18; Tel-Com Comments at 18.

167 Cap Cities Comments at 15-16.

168 This definition is similar to the definition of "network" included in the 1986 post-Quincy must-carry rules adopted in response to the decision in Quincy Cable TV, Inc. v. FCC (Quincy), 768 F. 2d 1434 (D.C.Cir. 1985), cert. denied, 476 U.S. 1169 (1986). See also Report and Order in MM Docket No. 85-349, 1 FCC Rcd 864 (1986). Commenters differ on whether to call the term network or substantial duplication and whether prime time is 6-11 p.m. or 7-11 p.m. Cap Cities Comments at 16; Armstrong Comments at 17; InterMedia Comments at 17; Tel-Com Comments at 18; InterMedia Reply at 6; Time Warner Reply at 10.

169 Adelphia Comments at 14; Time Warner Comments at 20-21; NCTA Comments at 18.

170 TKR Comments at 9.

171 See 47 C.F.R. § 73.662(h)(i). NCTA Comments at 19; contra INTV Reply at 11.

172 This definition of network is from the rules concerning the filing of affiliation contracts. See 47 C.F.R. § 73.3613(a)(i). Adelphia Comments at 14; Time Warner Comments at 20-21; contra INTV Comments at 11.

173 CFA/MAP Comments at 13.

programming, NAB states that the legislative history provides a clear guide that Congress intended to refer to stations broadcasting the same program at the same time over the majority of their entire program schedules.[174] However, a number of parties point out that the 1992 Act does not reflect this legislative history.[175] Some commenters propose a definition based on all-day viewing, including INTV, which would compare programming schedules between 6 a.m. and midnight and use a 50 percent cut-off.[176] Several parties propose that the test should be duplication, simultaneous or not, of either 50 percent or more of a station's total weekly programming or 50 percent or more of its prime time programming.[177] Acton and TCI state that a dual standard is appropriate because a focus on only all-day might overemphasize diversity in time periods when viewership is low and prime time alone would be inappropriate since it represents only a small percentage of the broadcast day.[178] Alternatively, Continental proposes a standard based on a 50 percent benchmark during prime time, the period when viewers and advertising revenues are most heavily concentrated. NBC, which also favors this proposal, notes that it comes from the post-Quincy must-carry rules and that Congress has not indicated any dissatisfaction with this definition.[179]

59. Upon evaluation of the comments, we believe that it is appropriate to treat the provisions of Sections 614(b)(2) and Section 614(b)(5) separately. We note that the two provisions are intended to accommodate different situations and are addressed separately in the statute and its legislative history. Specifically, Section 614(b)(2) applies when more local commercial stations request carriage than the cable system is required to carry. In this situation, Congress sought to ensure that subscribers receive the network affiliate closest to the system and "most likely to be responsive to their local needs and interests."[180] By contrast, Section 614(b)(5) addresses an alternate scenario in which the operator has sufficient channel capacity to carry all signals requesting carriage, but the programming on one or more signals substantially duplicates that of another signal. In this case, Congress intended to "preserve the cable operator's discretion while ensuring access by the public to diverse local signals" by permitting the system to

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174 NAB Comments at 20-21 referring to the House Report at 94.

175 Viacom Reply at 19; INTV Reply at 10.

176 INTV Comments at 13-14.

177 TKR Comments at 8; Acton Comments at 14-15; TCI Comments at 14-15; Viacom Comments at 65-66. Viacom further suggests that the comparisons be made during the immediately preceding sweeps period.

178 TCI Comments at 14-15; Acton Comments at 14-15.

179 Continental Comments at 14; National Broadcasting Company (NBC) Comments at 18-19.

180 House Report at 92.

carry only one of the substantially duplicating signals.[181] The commenters have persuaded us that, in view of these different purposes of Sections 614(b)(2) and (b)(5), we should not employ a single definition for network and substantially duplicative programming. We also note that the statute and legislative history direct the Commission to define two separate terms -- a broadcast "network" and "substantial duplication."[182]

60. We conclude that, for purposes of both subsections (b)(2) and (b)(5), network affiliates should include only stations affiliated with those entities that are considered traditional national networks. We believe that this approach reflects both congressional intent, as reflected by Section 614(b)(5)'s reference to a "station affiliated with a particular broadcast network (as such term is defined by regulation)," and the difference between stations that simply duplicate programming and those that have a continuing arrangement with a network that includes more than just the distribution of programming. At the same time, we seek a definition that not only includes entities that traditionally have been considered national television networks, but is also flexible enough to accommodate the changing video marketplace. Accordingly, we will use the definition of a network applicable to the filing of affiliation agreements as set forth in Section 73.3613(a)(i) of our rules. When a network meets the criteria specified in this definition, Commission recognition of the arrangement is triggered and the formal filing of relevant documents is required. Thus, we will define a "network" as "an entity that offers programming on a regular basis for 15 or more hours per week to at least 25 affiliates in 10 or more states."[183] To define "substantial duplication" for the application of Section 614(b)(5), we use the guidance provided in the legislative history that indicates that this term is intended to refer to the "simultaneous transmission of identical programming on two stations" and which "constitutes a majority of the programming on each station."[184] Accordingly, two stations will be considered to substantially duplicate each other "if they simultaneously broadcast identical programming for more than 50 percent of the broadcast week."[185] Moreover, for purposes of this definition, identical

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181 House Report at 94.

182 House Report at 92, 94.

183 We will define "regular basis" to mean exceeding the specified number of hours per week on an average basis during the preceding six months of operation. The requirement that stations involved in such arrangements must be located in 10 or more states should be sufficient to exempt regional networks from consideration in this context, as we believe Congress intended.

184 House Report at 94.

185 We conclude that it is appropriate to use a different definition for substantially duplicated signals in the commercial station context than in the NCE situation. Commercial networks distribute their programming for simultaneous broadcast, at least throughout a given time zone, while noncommercial network programming is often broadcast at a time chosen by the station.

programming means the identical episode of the same program series.[186]

61. In a related matter, NCTA seeks a clarification that the requirement to carry the closest network affiliate only applies when an operator exceeds its cap on the number of must-carry stations and does not apply when the cable system is choosing between duplicating stations pursuant to Section 614(b)(5). NAB responds that NCTA's interpretation is too narrow, is at odds with the legislative history and ignores the fact that the closest affiliate competes with the cable system for advertising.[187] While not explicitly stated, we believe that NAB's interpretation more closely parallels congressional intent in this regard. The must-carry provisions of the 1992 Act are intended to provide local television stations priority with respect to cable carriage on local cable systems. Thus, consistent with this approach, we will require that the closest station be carried when a cable operator declines to carry multiple network affiliates or duplicating stations. In addition, Southwest Missouri asks whether the carriage of a non-ADI network affiliate that is closer than an ADI affiliate would permit the operator not to carry the distant ADI affiliate because its carriage is duplicative.[188] The 1992 Act gives cable operators discretion to select which of duplicating must-carry signals to carry. In the situation posed by Southwest Missouri, the closer station would not meet the statutory definition of "local commercial television station" and the comparison would not be relevant.

4. Low Power Television Stations

62. Definition of Low Power Television Stations. Pursuant to Section 614(a) of the 1992 Act, a cable system's signal carriage obligation includes carriage of "qualified" low power television (LPTV) stations in certain limited circumstances. An LPTV station, as defined in Section 614(h)(2), qualifies for must-carry rights if the station conforms to the Commission's LPTV rules,[189] broadcasts for at least the minimum number of hours required of commercial broadcast stations by the Commission[190] and adheres to certain Commission requirements regarding non-entertainment programming and employment.[191]

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186 We also will consider programming to be duplicative in cases where the stations involved are located in contiguous time zones and the hour of broadcast differs by one hour.

187 NAB Reply at 22-23 citing the Senate Report at 84-85. See also Granite Comments at 22-23.

188 Southwest Missouri Cable TV (Southwest Missouri) Comments at 6-7.

189 See 47 C.F.R. §§ 74.701-74.784.

190 See 47 C.F.R. § 73.1740.

191 Section 614(h)(2)(B) provides that "such station meets all obligations and requirements applicable to television broadcast stations under part 73 of title 47, Code of Federal Regulations, with respect to the broadcast of nonentertainment programming; programming and rates involving political

However, an LPTV station will not be qualified unless the Commission determines that the provision of programming by such station would address local news and informational needs not being adequately served by full power television stations, because such full power stations are distant from the LPTV station's community of license. In addition, the LPTV station must comply with the Commission's interference regulations for LPTV stations;[192] it must be within 35 miles of the cable system's principal headend and deliver to the headend a good quality over-the-air signal; its community of license and the franchise area of the cable system must both have been located outside of the largest 160 Metropolitan Statistical Areas (MSAs) on June 30, 1990, and the population of the LPTV station's community of license on that date must not have exceeded 35,000; and there cannot be any full power television station licensed to any community within the county or other political subdivision (of a State) served by the cable system. Only if all of these requirements are met will an LPTV station be entitled to must-carry status. In the Notice, we sought comment on the implementation of this definition and the requirements of the 1992 Act relating to carriage of LPTV stations.[193]

63. The Notice first inquired whether a case-by-case determination of an LPTV station's qualification for must-carry status would be required for each LPTV station asserting must-carry rights or whether a general rule could be relied upon.[194] Several commenters responded that the statutory language suggests that the Commission must make an individual determination regarding qualification of each LPTV station asserting must-carry rights. Acton and TCI state that the language of the Act indicates that the initial burden is on the LPTV station asserting must-carry rights to prove to the Commission that it is qualified, after which the Commission should issue an "eligibility certification" which would be presented by the LPTV station to the cable

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candidates, election issues, controversial issues of public importance, editorials, and personal attacks; programming for children; and equal employment opportunity; and the Commission determines that the provision of such programming by such station would address local news and informational needs which are not being adequately served by full power television broadcast stations because of the geographic distance of such full power stations from the low power station's community of license;" See also 47 C.F.R. Part 73.

192 See 47 C.F.R. § 74.703.

193 Notice at 8061.

194 Notice at 8061. In footnote 39 of the Notice, we also asked if changes should be made to the low power television rules, Part 74, to indicate the distinction between the two classes of LPTV stations. Community Broadcasters Association (CBA) responded that the distinction should not be based on must-carry status, but rather on the LPTV's adherence to Part 73 of our rules. CBA Comments at 12. We believe it unnecessary to create a new Part 74 section of the rules relating to qualified LPTV stations, and instead will rely on the must-carry rules implemented herein to govern those LPTV stations which will qualify under the Act.

operator.[195] Other commenters suggest that at a minimum the Commission must make some final determination as to an LPTV station's qualification and that the cable operator should not be obligated to carry the LPTV station until the Commission has determined that the station is qualified.[196] CBA argues that case-by-case determinations would frustrate Congressional intent to grant certain LPTV stations must-carry rights, and would be administratively inefficient.[197]

64. The Notice also sought comment on how we should identify LPTV stations that address local news and informational needs that are not being adequately served by full power stations in the area. We tentatively concluded that the 1992 Act requires the Commission to make a determination regarding fulfillment of community needs only if an LPTV station asserts must-carry rights against a cable operator and is refused carriage.[198] Cable interests request that specific criteria be established by which a cable operator can make a good faith assessment of an LPTV station's eligibility under the statute, specifically with respect to the meeting of community needs.[199] The LPTV interests generally agree with the Commission's tentative interpretation that a determination regarding fulfillment of community needs should be made only if an LPTV station is refused carriage.[200] However, when an LPTV station is denied carriage and requests Commission review, CBA recommends that the Commission avoid making overly specific rules relating to community needs, as those needs may vary greatly.[201] Hence, CBA asserts that the definition provided in Section 614(h)(2)(b) should be adopted without any further specificity.[202] Alternatively, Moran states that, consistent with the

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195 Acton Comments at 17. TCI Comments at 17. Both of these parties suggest that the must-carry obligation not be effective until 90 days after the certification is granted.

196 Armstrong Comments at 18; InterMedia Comments at 18 and Reply Comments at 7; Tel-Com Comments at 20; Adelphia Comments at 15.

197 CBA Comments at 2 and Reply Comments at 2. In reply, CBA asserts that the cable interests, in demanding individual determination of qualification, are attempting to create a situation in which a cable operator can delay the effectiveness of its must-carry obligation through the use of protracted proceedings before the Commission.

198 Notice at 8061.

199 Comcast Comments at 10.

200 Notice at 8062.

201 CBA Comments at 4. NACB asserts that the definition of "qualified" is already too narrow and that the reliance on local news and information unjustly excludes educational institutions from qualifying. NACB Comments at 5.

202 CBA Comments at 4.

Commission's current renewal policies for broadcast television licenses, the determination could be based on a review of each LPTV station's issues and program lists supplemented by declarations from area residents and community leaders.[203]

65. We believe that the public interest and congressional intent require that, once must-carry rules and procedures for LPTV stations have been established, the Commission should intervene as little as possible in this area. A preliminary case-by-case determination by the Commission of each LPTV station's qualification for must-carry status would be an unnecessary burden and create delays in the implementation of must-carry rules. Once an LPTV station has made a showing of its must-carry eligibility to the cable operator, we will initially rely on the cable operator to review the requests and, where appropriate, voluntarily carry the qualified LPTV station without Commission intervention. This would appear to be the intent of the preliminary complaint steps outlined in Section 614(d)(1). The definition of a qualified LPTV station is rigorous enough, without the additional burden of presenting evidence of eligibility to the Commission prior to the assertion of must-carry rights. However, we do believe that an LPTV station which asserts must-carry rights must be prepared to demonstrate its compliance with the statute, and the extent and manner in which it is meeting community needs.

66. In general, an LPTV station asserting must-carry rights should provide the cable operator with the same evidence regarding its must-carry qualifications (including its role in addressing community needs) that the station would present to the Commission should its request for carriage be denied.[204] The cable operator will then be obligated to give full consideration to the request, and to respond to the LPTV station within the time frames specified herein.[205] In the event an LPTV station asserting must-carry rights is denied carriage, the station must follow the procedures detailed herein with respect to remedies for denial of carriage.[206]

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203 Moran Comments at 8-9. Moran cites Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process, 4 FCC Rcd 6363 (1989).

204 See paragraph 119, infra.

205 Comcast seeks assurances that the cable operator will not be subject to penalties for a good faith dispute over the eligibility of a LPTV station if the Commission subsequently determines that the LPTV station is qualified after the cable operator refused carriage. Comcast Comments at 10. We do not anticipate that a good faith disagreement over the eligibility of any LPTV station for carriage will result in any sanctions being levied against the operator. It does not appear that sanctions are allowed pursuant to Section 614(d)(3) unless, of course, the operator disobeys an order issued by the FCC.

206 See Remedies at paragraph 115 infra.

67. Signal Carriage Obligations. Cable systems are required to carry a qualified LPTV station only if there are not sufficient full power local commercial television stations to fulfill the cable operator's must-carry obligations under Section 614(b).[207] Assuming this requirement is met, Section 614(c)(1)(A) requires a cable system to carry one qualified LPTV station if it has 35 or fewer usable activated channels,[208] and Section 614(c)(1)(B) requires that a cable system carry two qualified LPTV stations if the system has a capacity of more than 35 usable activated channels.[209] In the Notice, we asked parties to address the criteria we should use to determine if a full power station is "local" for the purposes of this provision.[210] We then asked specifically if the market definition of Section 614(h)(1) should be applied, or if the limit should be based on county, state or mileage boundaries. In response to these questions, Comcast states that local full power television stations should include both commercial and noncommercial television stations.[211] CBA asserts that using the market definition of Section 614(h)(1) would defeat the purpose of the LPTV must-carry rules; since every county is assigned to an ADI and every ADI has a television station, every county will have a "local" ADI station that will make it more difficult for an LPTV station

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207 See §§ 614(c)(1)(A) and (B). We note that in paragraph 29 of the Notice we inadvertently left out the word "commercial" in describing this requirement, Notice at 8061.

208 See definition of activated channels at paragraph 13 supra.

209 When the number of local commercial television stations exceeds the maximum number of such signals a cable system is required to carry, the cable operator is prohibited from carrying a qualified LPTV station in lieu of a local commercial television station asserting must-carry rights. See Section 614(b)(2)(A).

210 Notice at 8061.

211 Comcast Comments at 9-10. In the context of this question, Comcast raises a concern regarding the statutory language of Section 614(h)(2)(F), which states in part that a low power station will be qualified "only if ... there is no full power television broadcast station licensed to any community within the county or other political subdivision (of a State) served by the cable system." Comcast complains that this language is ambiguous and therefore subject to misinterpretation. Comcast asserts that potential confusion may arise from the syntax of the sentence which refers to a single county, even though many cable systems serve more than one county from a common headend. Comcast asserts that this should be interpreted to mean that where a cable system serves any community to which one or more full power stations are licensed, an LPTV station will not qualify for carriage on the system. Similarly, Section 614(h)(2)(E) refers to a single franchise area, but according to Comcast it should be interpreted to refer to all franchise areas served by a single system. We believe, contrary to Comcast's assertion, the correct interpretation is that, if a full power station is located in the same county or political subdivision (of a State) as an otherwise "qualified" LPTV station, the LPTV station will not be eligible for must-carry status.

to secure carriage. CBA thus states that a full power station should be considered local only if it is within the same state as the cable system on which the LPTV station seeks carriage and it is within 35 miles of the cable system's headend.[212] On the other hand, Moran argues that the definition of local full power station should be consistent with local commercial television station as defined in Section 614(h)(1), thereby excluding from the definition those full power stations which simply rebroadcast the programming of another distant station.[213]

68. The Notice also asked for comments on procedures to be followed if a full power station came on the air preempting the LPTV station's must-carry rights. We proposed to require the cable operator to give notice to the LPTV station at least 30 days before discontinuing carriage of the LPTV signal and we requested comment on the need to notify subscribers of the upcoming change.[214] CBA requests that the cable operator give the LPTV station 120 days prior notice to permit that station to negotiate for carriage.[215] Several commenters urge adoption of a uniform notice provision and state that subscribers should be notified of any changes in carriage at least 30 days in advance, either with the billing or as a separate notice.[216]

69. With respect to the requirements of Section 614(c)(1), we interpret the "lack of enough full power local commercial television stations" as meaning those stations as defined in Section 614(h)(1) of the Act. Indeed, we believe that the Act's specific definition of a local commercial television

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212 CBA Comments at 3.

213 Moran Communications (Moran) Comments at 3-4.

214 CBA Comments at 8. The LPTV interests assert that the introduction of a full power station does not require displacement of an existing LPTV station, stating that Section 614 of the 1992 Act only refers to what is required to qualify a LPTV station for must-carry rights, and that the Act does not address disqualifying that same qualified LPTV station. Referring to the Cable System Carriage of TV Signals, 41 RR 2d 121 (1977) at 127, CBA recommends the reinstatement of the "two way grandfathering clause," established by that Order, which would have the effect of requiring continued carriage of an LPTV station even if a new full power station enters the community. We do not believe the 1992 Act preserves the rights of an LPTV station if it loses its status due to the introduction of a new full power local station asserting must-carry rights.

215 CBA also requests that the Commission recognize an affected LPTV station as a full party in interest in any proceeding to expand the broadcast market of the cable system as permitted by Section 614(h)(1)(c). CBA Comments at 8.

216 CBA Comments at 9; NATOA Comments at 10; Palm Desert Comments at 8.

station leaves no room for a different interpretation.[217] We note that the statute provides the opportunity for cable operators and broadcasters to request amendment of an ADI market pursuant to Section 614(h)(1)(C) and we have established procedures for such requests pursuant to Section 76.7 of our rules. In the event a new local full power station enters the market, requiring displacement of the LPTV station under Section 614(b)(2)(A), the cable operator will be required to give both the LPTV station and its subscribers 30 days notice prior to any change in carriage.[218]

70. Use of PEG Channels. A cable operator required to carry more than one signal of a qualified LPTV station may place the additional station on public, educational or governmental (PEG) channels not in use for their designated purposes, subject to approval by the franchising authority.[219] The Notice requested comments on the implementation of this provision, as well as the consequences of the franchising authority's withdrawal of approval for the LPTV station's use if a qualified PEG user later materializes.[220]

71. Public interest groups assert that the involvement of the franchising authority in approving and denying the use of PEG channels is "pivotal," since the franchising authority is charged with protecting its community's public interest. Palm Desert asserts that Section 611 controls the relationship between the franchising authority and the cable operator's request for use of a PEG channel and proposes several specific rules relating to the use of PEG channels for meeting must-carry obligations.[221] CFA/MAP states that the franchising authority alone should be the party to decide the appropriate use of PEG channels, but they request that the Commission require the franchising authority to provide public notice of an impending decision and require the authority to vote in a public meeting on the use of such channels.

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[217] We recognize that there may be situations where an otherwise qualified LPTV station asserts that it is meeting the needs of the community not being met by a full power station, regardless of the distance of that station from the LPTV station's community of license, and that LPTV station is denied carriage. In this case, the LPTV station would be free to file a complaint with the Commission so that we may consider its qualification status under these circumstances.

[218] This requirement is consistent with the customer service standards we adopt today in MM Docket No. 92-263. Under those standards, a cable operator must give its subscribers 30 days notice of any changes to its channel line-up. See Report and Order in MM Docket No. 92-263, adopted March 11, 1993.

[219] Section 614(c)(2).

[220] Notice at 8062.

[221] Palm Desert Comments at 5-7. These rules would require a cable operator to show that no alternate channel is available every six months, to demonstrate that the PEG channel is fully unused, and to move the signal within 30 days if a new channel becomes available. In addition, they also would provide that a new PEG channel will be considered to be in use for the first year.

NATOA also suggests that the Commission require that a franchising authority be served with all pleadings relating to issues between local stations, cable systems and the Commission.[222] In addition, some commenters express concerns regarding the use of PEG channels, including their continued availability for their intended use, the ability to displace LPTV stations if necessary,[223] the exact definition of "in use," especially concerning bulletin board use, and a recommendation that a PEG and an LPTV station be permitted to share a PEG channel.[224] Consistent with our discussion regarding the use of PEG channels for NCE carriage, we will defer all such decisions to the franchising authority.[225]

5. Sales Presentations and Program Length Commercials

72. Section 614(g) provides that a cable operator will neither be required to carry nor prohibited from carrying the signal of a commercial television station that is predominantly used for the transmission of sales presentations or program length commercials until the Commission completes a related proceeding. That required proceeding is intended to determine whether such broadcast television stations serve the public interest, convenience, and necessity and are entitled to must-carry status.[226] On January 14, 1993, the Commission initiated such a proceeding.[227] Until a final definition of "predominantly utilized for the transmission of sales presentations or program length commercials" is adopted in MM Docket No. 93-8, an interim definition is needed in order to implement Section 614(g).

73. In the Notice, we sought comment on whether an appropriate interim definition would be one that considers channels to be "predominantly utilized" for such purposes if more than 50 percent of their programming week consists of sales presentations or program length commercials. Adelphia and Time Warner support the proposed definition and suggest that the definition of commercial matter set forth in Section 76.225 -- "airtime used for the offering of goods or services for sale" -- might provide a means for determining what constitutes "a program length commercial" or "sales presentation."[228] INTV recommends that the definition exclude late night hours (12 midnight to 6 a.m.) to avoid

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222 NATOA Comments at 11. NATOA also suggests that a cable operator be required to show every six months that the use of the PEG channel is still necessary, as no other channel capacity is available.

223 CFA/MAP Comments at 10-11.

224 CBA Comments at 13.

225 See paras. 22-23, supra.

226 Section 614(g)(2).

227 See Notice of Proposed Rule Making in MM Docket 93-8, 8 FCC Rcd 660 (1993).

228 Adelphia Comments at 15, Time Warner Comments at 22-23.

misclassifying independent stations that broadcast such programming at that time.[229] Acton favors a dual test of 50 percent of the broadcast week or 50 percent of prime time hours to define such stations.[230] CFA/MAP claims that a 50 percent per day cap should also count all commercial matter carried during the programming day, including commercials during "ordinary programming."[231] In addition, Acton states that any station requesting must-carry status should certify that it is not predominantly broadcasting sales presentations or program length commercials, while Adelphia and Time Warner contend that cable operator determinations should be controlling during the interim period.[232]

74. We believe that our proposed definition of a station that is predominantly used for sales presentations and program length commercials is appropriate for use during the interim period because it is simple to apply. Accordingly, stations will qualify for this definition if more than 50 percent of their programming consists of such commercial material. We do not agree with INTV that this definition disadvantages independent stations that use such programming as their overnight service.[233] We also reject CFA/MAP's proposal to include commercials during other programming since under our broadcast system it is these commercials that make ordinary programming possible. While the definition of commercial matter in Section 76.225 describes the programming covered by this provision, it also describes traditional commercials. Thus, we will not adopt this definition. We also believe that it is generally understood that the programming in question includes sales presentations longer than traditional commercials inserted in programming. Moreover, as we do not want to burden either cable operators or broadcasters during this interim period, we will not require any additional certifications. A station whose status under this provision is disputed may seek a Commission determination of its right to carriage pursuant to the procedures described below.

C. Manner of Carriage Provisions Applicable to Commercial and Noncommercial Stations

1. Content to be Carried

75. Pursuant to Section 614(b)(3)(A) of the 1992 Act, a cable operator

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229 INTV Comments at 14.

230 Acton Comments at 16; TCI Comments at 16. Commenters proposed the same test to define "substantial duplication."

231 CFA/MAP Comments at 13-14.

232 Adelphia Comments at 15; Time Warner Comments at 22-23.

233 A station that operates 24 hours a day, 7 days a week, is on the air for a total of 168 hours. Thus, under this definition, it could air such programming for up to 84 hours a week without being so classified. A midnight to 6 a.m. shopping service would only represent 42 of those permissible hours.

is required to carry, in its entirety,[234] the primary video, accompanying audio, and line 21 closed caption transmission of local commercial television stations and, to the extent technically feasible, to carry program-related material contained in the vertical blanking interval (VBI) or on subcarriers. This provision also provides that the retransmission of other material in the VBI or other nonprogram-related material shall be carried at the discretion of the cable operator. Furthermore, where appropriate and feasible, a cable operator may delete signal enhancements, such as ghost-cancelling, from the broadcast signal and employ such enhancements at the system headend. Section 615(g)(1) provides the same requirements for NCE stations, except that cable operators also must carry program-related material contained in the VBI or on subcarriers "that may be necessary for receipt of programming by handicapped persons or for educational or language purposes." The retransmission of other material in the VBI or on subcarriers of NCE stations is also at the discretion of the cable operator. In the Notice, we requested comment on implementation of these requirements. In particular, we proposed to draw on copyright law to decide when material in the VBI or on subcarriers is program-related. In this regard, the courts have held that the copyright of a television program includes program material encoded in the VBI when "related images" are involved.[235] We also asked whether cable systems may delete signal enhancements for noncommercial stations and reintroduce them at the headend, even though this is not specifically mentioned in the 1992 Act.

76. Some cable operators support the proposal to parallel the related copyright definition of program-related material and assert that such material should be limited to that which is freely available to all viewers. Cap Cities contends that the factors enumerated in WGN Continental Broadcasting should serve as a model for a broad definition of program-related material that includes information that is unlocked and receivable with the necessary peripheral equipment.[236] However, NAB asserts that this definition should not control the Commission's determinations since it is not mentioned in the legislative history.[237] It further seeks to have VBI material related to commercials considered program-related because commercials make the advertiser-

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234 Section 614(b)(3)(B) provides that the cable operator shall carry the entirety of the program schedule of any television station included on its system unless carriage of specific programming is prohibited, and other programming is authorized to be substituted, pursuant to Section 76.67 (regarding sports broadcasts) or Subpart F of Part 76 of the Commission's rules (regarding nonduplication protection and syndicated exclusivity).

235 See WGN Continental Broadcasting v. United Video (WGN Continental Broadcasting), 685 F.2d 218 (7th Cir. 1982).

236 Cap Cities Comments at 18-20.

237 NAB Comments at 22.

supported broadcasting system possible.[238] Nielsen specifically asks that the line 22 program identification codes it uses to support its ratings service be carried.[239]

77. With respect to NCE stations, APTS states that the requirement that cable systems must carry the primary audio, video and line 21 closed caption transmissions in their entirety without exception should be made clear.[240] APTS also asserts that Congress intended program-related material to be material that is integrally, as opposed to tangentially, related to the primary programming.[241] Time Warner and Adelphia contend that Section 615(g)(1) explains, rather than expands, the definition of program-related material by stating that it "may be necessary for receipt of programming by handicapped persons or for educational or language purposes."[242] In order not to undermine the public's statutory right to have access to line 21 closed-captions, NCI advocates that Section 76.606 be kept intact and construed to require the delivery of line 21 closed captions any time they are received at the headend of a cable system.[243]

78. As noted above, cable systems need only carry program-related material on VBIs or subcarriers where "technically feasible." NCTA asks that this term not be defined beyond what is stated in the statute because technical feasibility may be affected by the particular characteristics of the equipment used by the system or the types of communications used between the system headend and other points of its facility.[244] A few cable operators suggest that, at a minimum, this provision does not require the cable operator to incur additional costs or to change equipment in order to carry such material and that any standards should consider the financial limitations of cable

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238 Cap Cities Comments at 20. Cap Cities adds that this interpretation would be consistent with the WGN Continental Broadcasting decision and Section 614.

239 A.C. Nielsen Company (Nielsen) Comments at 4-8.

240 APTS Comments at 26-27. WNYC seeks an additional clarification that this requirement refers to carriage over the entire broadcast day. WNYC Comments at 15-16.

241 APTS Comments at 26 citing House Report at 101.

242 Time Warner Comments at 24; Adelphia Comments at 16.

243 National Captioning Institute (NCI) Comments at 3-4. We note that the provisions of 76.606 apply to all broadcast stations, not just NCE stations.

244 NCTA Comments at 21.

operators.[245] NAB and APTS contend that virtually all cable systems have the capability of retransmitting the VBI and subcarriers of broadcast channels.[246] NAB also is concerned that cable operators may design systems that make such retransmission impossible, particularly in light of the increasing uses of such services (e.g., interactive television) that may compete with similar services offered by the cable system.[247] NAB adds that the viability of these new services would be jeopardized if cable systems were able to create a bottleneck that blocked viewer access to such services. Continental urges that any rules take into account the possibility that carrying material on the VBI may not be feasible in the future because of ATV, compression, or other technological advances.[248] APTS and NAB, however, argue that Commission policies should ensure that cable operators take into account the obligation to carry all program-related material in developing any new transmission systems.[249]

79. MSTV urges the Commission to bar any stripping of ghost-cancelling reference signals, at least until the conclusion of the line 19 rulemaking[250] and its initial implementation, in order to foster development of this technology.[251] NAB states that the Commission should require cable systems to carry the ghost-cancelling reference (GCR) signal of a local commercial television station on line 19 so that viewers can be assured of receiving the full benefit of this technology.[252] TKR submits that cable operators should be allowed to process both commercial and NCE signals uniformly to ensure the highest quality signal retransmission as long as such techniques do not detract

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245 Time Warner Comments at 23; Adelphia Comments at 15; TKR Comments at 9-10; Consortium of Small Cable System Operators (Small Operators) Comments at 3-4.

246 NAB Comments at 24. In order to monitor and enforce this requirement, APTS recommends that cable operators indicate whether or not the VBIs or subcarriers are carried as part of the signal identification requirements of Section 615(k). APTS Comments at 26-27.

247 NAB Comments at 24-25.

248 Continental also claims that carriage of VBI information could prevent scrambling that is needed to prevent theft of service. Continental Comments at 23-24.

249 APTS Comments at 28; NAB Comments at 25-26.

250 See Notice of Proposed Rule Making in MM Docket 92-305, 8 FCC Rcd 90 (1993).

251 Association for Maximum Service Television (MSTV) Comments at 4-6.

252 To prevent this, NAB recommends that a rule be adopted which reserves line 19 of broadcast signals carried by cable systems for the GCR signal. NAB Comments at 22-24.